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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-636

CARMINE LOMBARDOZZI,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Dated: October 26, 1972

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The Petitioner, Carmine Lombardozzi, prays that a Writ of Certiorari issue to review the judgment and opinion entered on September 27, 1972, by the United States Court of Appeals for the Second Circuit, in the proceeding entitled United States of America, Plaintiff-Appellee v. Carmine Lombardozzi, Defendant-Appellant, Docket No. 72-1250.

Opinions Below

The judgment and opinion of the Court of Appeals for the Second Circuit, not yet reported, appears in the Appendix at Page A-1.

Jurisdiction

The judgment and opinion of the Court of Appeals was entered on September 27, 1972. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1).

Question Presented

Whether it was proper for the Circuit Court of Appeals, in reviewing a determination of the District Court, to refuse to direct either specific performance or withdrawal of Petitioner's plea of guilty where that plea was motivated by promises made by Government agents and the promises were unfulfilled.

Statutory Provisions Involved

Title 18, United States Code, Section 371 states in part:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Rule 32(d) of the Federal Rules of Criminal Procedure states in part:

> "A Motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea."

Statement of The Case

The Petitioner, Carmine Lombardozzi, his brother, Daniel Lombardozzi, and the eleven other named defendants, were indicted in a two count Indictment charging the sub-

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stantive offense of causing a stolen check, worth more than $2,000, to be transported in interstate commerce in violation of Title 18, United States Code, Sections 2314 and 2 and for conspiring to cause the same check to be transported in interstate commerce in violation of Title 18, United States Code, Section 371.

On March 12th, 1969, during the trial and before the Government had rested its case, the Petitioner withdrew his not guilty plea and entered a plea of guilty to the conspiracy count of the Indictment. Prior to the Petitioner's sentencing a Motion was filed on his behalf to withdraw the guilty plea previously entered. The reasons upon which the Petitioner based his Motion were certain unfulfilled promises made by the Government which induced the Petitioner to plead guilty. The "promises" made by the Government to the Petitioner were that the Government attorneys would insure that the Petitioner's brother, Daniel, would not be imprisoned and that the Petitioner, after his guilty plea, would not serve any prison time in addition to the sentence yet to be imposed by the New York State Supreme Court on an unrelated perjury conviction.

After an evidentiary hearing was held, the District Court denied Petitioner's Motion and that Order was affirmed by the United States Court of Appeals for the Second Circuit. *United States* v. *Lombardozzi*, 436 F. 2d 878 (2nd Cir., 1971) cert. den'd, 402 U.S. 908 (1971). During this earlier Motion and its subsequent Appellate review, Petitioner contended that the promises and representations made by Government agents was the sole motivating factor for his plea.

On March 7th, 1972, the Petitioner renewed his Motion for the withdrawal of his plea of guilty in the District Court and alternatively applied for the same relief under Title 28, United States Code, Section 2255 on the ground that his sentence was imposed in violation of his Constitutional rights. The prosecution of this Motion was based primarily upon the United States Supreme Court's decision in *Santobello* v. *New York*, 404 U.S. 256 (1971). Events which occurred subsequent to the District Court's denial of Petitioner's renewal of his Motion to withdraw his plea of guilty, which events include Petitioner's surrender to Federal incarceration,[1] have confirmed earlier suspicions that the Government had no intention of fulfilling the promise that Petitioner "would serve no time in a Federal institution".

Reasons For Granting The Writ

The Circuit Court of Appeals has ruled that in the instant case there were no promises made by the prosecutor which constituted a significant basis for the Petitioner's plea of guilty. It is critical to the determination of the issues herein to view the question presented at bar in the broader context of the Petitioner's earlier Motion to withdraw his plea of guilty, the Motion of February 2, 1970. That Motion, made pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure, alleged that certain promises had been made to the Petitioner and that these promises became the sole motivating factor which induced the Petitioner to enter his plea. The District Court's disposition of the Motion included the opinion that Petitioner was not mislead

[1] Petitioner is presently incarcerated at the Federal Medical Center at Springfield, Missouri, due to his extremely poor physical condition.

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by the promises and that in entering the plea the consequences were understood by him (A 348).* Further, the District Court stated, in apparent recognition of the fact that a bargaining process had transpired between Petitioner and agents of the Government, wherein certain assurances were made to Petitioner, that the form of the Court's sentence would allow the Justice Department to afford Petitioner exactly what he had been promised (A 351-352). In other words, Petitioner's initial allegations in his Motion to withdraw his plea were that that plea was entered only after a representative of the Government had convinced him that any sentence which the Trial Court imposed would not result in an additional period of incarceration. After the evidentiary hearing was held and it became clear that certain assurances were indeed made to Petitioner, the Trial Court's judgment was that these promises were a matter which concerned only the Government and Petitioner and that the Court fulfilled its obligation to the Petitioner by enabling the Government to complete the bargain. When counsel submitted to the District Court that its ruling left no forum which would insure that the Government kept its promise, the Court indicated that the Petitioner was obliged to properly assess the sincerity of his adversary prior to entering the plea (A 352-353). Upon review, the Circuit Court of Appeals indicated similarily that the Petitioner's plea of guilty was motivated by his "own calculation of . . . actual value of any commitments made to him by the prosecutor . . ." 436 F. 2d at page 881. Here, too, the Court's decision was made without reference to whether the prosecutor's promise would remain unfulfilled.

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*"A" refers to Petitioner's Appendix in the United States Court of Appeals for the Second Circuit.

With regard to the Motion at bar, Petitioner relies on this Court's decision in *Santobello* v. *New York*, 404 U.S. 257 (1971) where it was held that

> "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promises must be fulfilled".

It thus becomes clear that there is indeed a forum for relief where the prosecutor fails to fulfill his promise. In *Santobello* this Court indicated that the appropriate relief would be either in the form of specific performance of the prosecutor's promise or allowing the defendant to withdraw his plea of guilty. In the instant case Petitioner seeks relief on the basis of unfulfilled assurances by Special Agent Kinnaly of the Federal Bureau of Investigation who conferred with Petitioner on behalf of the Government (A 213). More specifically, the agent had personally represented to Petitioner that he would not, as a result of the Federal conviction, serve any more time than the sentence imposed on the unrelated State perjury conviction (A 189). However, the Circuit Court of Appeals, in affirming the lower Court's denial of the Motion at bar, held that Kinnaly's representations did not equal a promise or assurance but was merely a suggestion. Petitioner now respectfully submits that, to the contrary, the record clearly supports a finding that Kinnaly's representations were in fact promises on which Petitioner relied. As was submitted to this Court in Mr. Lombardozzi's earlier Petition to this Court for a Writ of Certiorari on the original Motion, Agent Kinnaly's testimony included the following:

> "Q. You told him he wouldn't get any more time either, than the state, right? A. I believe I did, yes, sir." (A189)

And further during cross examination:

> "Q. During the conversation that took place before he entered the plea, that is before that time on March 12th, did you tell him he would get a concurrent sentence? A. Yes, sir." (A 212)

This testimony, it is submitted, indicates far more than a simple suggestion. The Circuit Court of Appeals stated in the same manner as the District Court that Petitioner received what he bargained for when he was sentenced pursuant to Section 4208(a)(2). This, it is submitted, is not consistant with the finding of both the District Court and the Circuit Court that Petitioner was not "an uncounselled, uneducated defendant unfamiliar with the workings of the criminal law but rather a sophisticated and intelligent man" 436 F. 2d at page 880. Section 4208(a)(2) was merely the means by which the Government could assure that the Petitioner would serve no time in a Federal institution. Their failure to employ that means has violated Petitioner's right to due process. Accordingly the Petitioner should either be allowed to withdraw his plea of guilty or an Order should be entered directing the Government to specifically perform its promise by paroling the Petitioner under the authority of Section 4208(a)(2).

CONCLUSION

For these reasons a Writ of Certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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Dated: October 26, 1972

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APPENDIX

Opinion And Judgment of The Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 809—September Term, 1971.

(Argued July 17, 1972 Decided September 27, 1972.)

Docket No. 72-1250

UNITED STATES OF AMERICA,

Appellee,

v.

CARMINE LOMBARDOZZI,

Appellant.

Before:

FEINBERG, MULLIGAN and OAKES,

Circuit Judges.

Appeal from the denial, after argument, of a motion under Fed. R. Crim. P. 32(d) to withdraw a guilty plea or in the alternative, pursuant to 28 U.S.C. § 2255, for an order vacating the sentence imposed following a judgment of conviction dated June 12, 1970, in the United States District Court for the Eastern District of New York, John F. Dooling, Jr., *Judge*, sentencing appellant under 18 U.S.C. § 4208(a) (2) to the custody of the Attorney General for a term of 2 years.

Affirmed.

JAMES M. LAROSSA, New York, New York (Gerald L. Shargel, New York, New York, on the brief), *for Appellant.*

PATRICK T. PHILBIN, Special Attorney, United States Department of Justice (Robert A. Morse, United States Attorney, Eastern District of New York, Patrick F. Broderick, Special Attorney, United States Department of Justice, of counsel), *for Appellee.*

OAKES, *Circuit Judge:*

Appellant pleaded guilty on March 12, 1969, to a violation of 18 U.S.C. § 371, conspiracy to violate 18 U.S.C. § 2314, by agreeing to transport in interstate commerce a stolen check having a value of more than $5,000. On June 12, 1970, he was sentenced to 2 years in the custody of the Attorney General under 18 U.S.C. § 4208(a)(2). He had moved on February 2, 1970, to withdraw his plea of guilty under Rule 32(d) as not voluntarily made and the motion was denied on June 5, 1970, after hearings in which the Assistant United States Attorney, Daniel P. Holman, and an FBI agent, Daniel Kinally, testified as to circumstances surrounding the guilty plea. His previous appeal from the denial of that motion was denied by this court on January 28, 1971. *United States* v. *Lombardozzi*, 436 F.2d 878 (2d Cir.), *cert. denied*, 402 U.S. 908 (1971).[1] On the basis of

[1] He also unsuccessfully appealed the denial of a motion under Fed. R. Crim. P. 35, for a reduction of his sentence on the basis of his physical condition. *United States* v. *Lombardozzi*, 456 F.2d 1336 (2d Cir. 1972).

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the intervening decision in *Santobello* v. *United States*, 404 U.S. 257 (1971), he renewed his Rule 32(d) motion for the withdrawal of his guilty plea and moved alternatively, pursuant to section 2255 of Title 28, for an order vacating his sentence. From the denial of those motions, he appeals here.

Appellant's main contention is that his plea of guilty was in reliance on a promise by the prosecutor, or rather the prosecutorial "team," that any sentence resulting from his plea would be concurrent with and run no longer than the sentence he was then awaiting on a perjury charge in the New York State Supreme Court, Kings County. On his previous appeal, 436 F.2d at 880, appellant had urged that his plea was involuntary "because the government's promise that his state and federal sentences would be concurrent was the sole motivating factor for his plea . . . ." This court pointed out that the record showed that appellant himself, who was "not an uncounseled, uneducated defendant unfamiliar with the workings of the criminal law," initially approached the Government attorney and said, "I would like to take a plea of guilty to this indictment." He did this only after he had heard the testimony against him of the Government's principal witness. The plea, moreover, was accepted only after three transcribed conferences were held in court, at which the sentencing judge made it clear that he would make no recommendation to the Attorney General and that whether the federal and state sentences would be concurrent would be left wholly to the Attorney General's discretion. 436 F.2d at 881. The sentencing judge in fact followed his pronouncement precisely in sentencing appellant under 18 U.S.C. § 4208(a)(2).

Appellant argues here that under *Santobello* acceptance of a plea of guilty ". . . must be attended by safeguards to insure the defendant what is reasonably due [under circumstances that will vary], but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." 404 U.S. at 262. In *Santobello* the original prosecutor promised that there would be no sentence recommendation by the prosecution and that promise was breached by a new prosecutor who recommended the maximum 1-year sentence. In the instant case the Assistant United States Attorney denies making any promise himself, and appellant bases his argument upon assurances he claims were given him by FBI Agent Kinally, who was a member of the prosecutorial team. Appellant relies in this connection upon *Giglio* v. *United States*, 405 U.S. 150 (1972), which held that the Government's failure to disclose a promise of leniency made to a key witness by one Assistant United States Attorney—even if unauthorized or if his superiors or associates were uninformed of the promise —necessitated a new trial under *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935), and related cases.[2]

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[2] The dissenting opinion in *Moore* v. *Illinois*, 40 U.S.L.W. 5071, 5078 (U.S. June 29, 1972), lends further weight to appellant's argument in reference to Agent Kinally: "When the prosecutor consciously uses police officers as part of the prosecutorial team, those officers may not conceal evidence that the prosecutor himself would have a duty to disclose." Undeniably Agent Kinally was a part of the "prosecutorial team" in the same sense as in *Moore;* it may be, however, that in omitting any mention of the police officer the majority in *Moore* would not support this proposition.

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The evidence of a promise by Agent Kinally, now deceased, on which appelalnt relies, is Kinally's own testimony at the evidentiary hearing on the original motion to withdraw the guilty plea as follows:

> . . . there is no question in my mind that I must have convinced him that I was speaking for Mr. Hollman [sic] when I wasn't.
>
> * * * * *
>
> I was speaking to Mr. Lombardozzi only as a Government agent. I spoke to him and conveyed to him this idea of a concurrent sentence.
>
> * * * * *
>
> Q. There's no question in your mind, Mr. Kinally [sic], that between the 7th and 12th of March (the date the plea was entered) Mr. Lombardozzi believed the sentence would run concurrent with the State; isn't that right? A. Well, that was his understanding. Yes, sir, he told me that.
>
> Q. Did he also tell you that it was his understanding that he wasn't going to serve any more time? A. Yes.

Appellant in his brief would have us construe this as an admission by Agent Kinally that he did make a "promise" to appellant that he "would serve no time in a Federal institution." We fail to see any such admission. True, Agent Kinally conceded that he convinced appellant that he was speaking for the Assistant United States Attorney when he was not, but this is different from the agent's saying that he tried to convince appellant to this effect. Rather, he was speaking to appellant "only as a Government agent." While Kinally may have "conveyed" the

"idea of a concurrent sentence," this falls short of amounting to a promise; he had made a suggestion, not an assurance. Indeed, the transcript of the evidentiary hearing indicates that appellant knew Kinally could not bind the Department of Justice.[3] And assuming arguendo that appellant's "understanding," conveyed to the agent, was that the federal sentence would run concurrently with the state and that "he wasn't going to serve any more time," this again falls short of an admission of any promise as such. Indeed, Agent Kinally testified that he never guaranteed anything to appellant and that appellant never requested a guarantee.

There was no finding below of a promise made by Agent Kinally. The court said, in commenting on appellant's counsel's reference to "a deal" between Kinally and appellant at the conclusion of the evidentiary hearing:

> Let me comment specifically on that. I do not think that Mr. Lombardozzi was under any illusion that he was going to avoid spending any time in a Federal prison.
>
> I think he certainly knew when a useful bit of lubrication could be injected into a difficult situation, and he did it expecting it would move the talks along—no doubt it may have helped to do.

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[3] Q. Did you, in fact, ever indicate to him that it was not at all within your control or the control of the F.B.I.?

A. Mr. Lombardozzi knew that this was in the control of the Department of Justice.

Q. Well, how did he know that; how do you know that he knew that?

A. Because he referred to Mr. Holman several times. He understood that I was saying what I said, but he knew that I was not enough; that the Department would make the final determination, or rather the sentencing—I'm sorry—the sentencing, that was the final determination.

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> I think that Mr. Lombardozzi thought that since the Attorney General would have the discretion, both to designate the prison as the place in which time would be served and the power under Section 4208(a)(2) to admit to parole at anytime.
>
> If that promise—if it could be called that—was carried out, he would have exactly what he had been promised, a power lodged with the Attorney General to see to it that he did not serve a single day in a Federal Prison, if that was his deal with Mr. Holman.[4]

Later on appellant's counsel started to point out that "there is no forum to assure that the Attorney General" in effect would carry out any assurance to appellant, when the court interrupted to say: "That, Mr. Lombardozzi kn[e]w. He is not naive. He had to look at his man Holman and decide, and he did." In other words, the court below was stating, as this court said in 436 F.2d at 881, "that the appellant calculated his position and made a rational decision to plead guilty." In this regard it is interesting to note, and not altogether insignificant, that before the plea was originally accepted, in response to the

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[4] In candor, however, the court below may have thought it had found a promise when the following colloquy took place after *Santobello*, although it may have been agreeing only with counsel's proposition that the issue had been decided solely on the basis of nonreliance:

> I submit to the Court that your finding of fact and a reading of Santobello demands at this time, by following the judicial decree herein, that the motion has to be granted at this time, that the motion to withdraw the plea must be granted, because there was a promise made, there is no question about that. Agent Canelli [sic], who testified here, unequivocally stated that there was a promise. You decided it, if I may, on the issue of whether or not the defendant relied on that promise completely.
>
> The Court: That's right.

court's questions, appellant (and his brother who also pleaded guilty at the same time as appellant) stated that no threats prompted the pleas and that there were no "inducements" of which the court had not been informed. As stated previously, the sentencing judge had by that time made it clear that he would not direct that the appellant's federal sentence would be concurrent with the state sentence nor recommend such a procedure to the Attorney General. There is no indication that up to the time of the acceptance of the plea there was any claim on appellant's part that the prosecutorial team had assured him he would have a federal sentence concurrent with his state sentence or would serve no federal time.

We may agree with the court below that some of the agent's and possibly the Assistant United States Attorney's comments to appellant were ill-advised. We cannot construe them, however, into a *Santobello* promise, one that "can be said to be part of the inducement or consideration," 404 U.S. at 262, that appellant would not serve any federal time. Appellant received, in short, all that he bargained for when he received a sentence under section 4208(a)(2) to the custody of the Attorney General. On this view of the case it is unnecessary to deal with the effect of Judge Dooling's apparent finding in the earlier hearing, which was affirmed by us (436 F.2d at 880), that even if there had been a "promise," appellant's decision to plead guilty was not made in reliance on it.

Judgment affirmed.